APR 4 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-110

DAVID GELBARD and SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 71-263

UNITED STATES OF AMERICA, PETITIONER

v.

JOGUES EGAN and ANNE ELIZABETH WALSH

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This memorandum is submitted in response to Mr. Justice Douglas' request, during the argument of

these cases, that the government submit a supplemental memorandum discussing further the decisions of this Court on the application of the Fourth Amendment to grand juries.

1. The rule established by decisions of this Court, in our view, is that the Fourth Amendment has a limited application to the proceedings of grand juries. Its primary application is to bar enforcement of grand jury subpoenas deemed to be so over-broad that they constitute a constitutionally-forbidden general search.

In *Hale* v. *Henkel*, 201 U.S. 43, 71-77, this Court concluded that the subpoena *duces tecum* involved was "far too sweeping in its terms to be regarded as reasonable" (at 76) and that the production of so massive a volume of material required a sufficient demonstration of materiality to justify its production. In applying a test of reasonableness, this Court concluded that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment" (at 76), concluding that "[a] general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms" (at 77). This view regarding the Fourth Amendment's limitation upon "the production of corporate records and papers in response to a subpoena or order authorized by law" was reiterated in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 194-218, where this Court observed:

> the Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant [p. 208].

The holding in *Silverthorne Lumber Co., Inc.* v. *United States*, 251 U.S. 385—that the government cannot obtain a grand jury subpoena directed to a potential defendant's papers that originally came into its hands by a blatantly unjustified and overly broad search and which the court directed the government to return upon holding that their seizure had been illegal—represents a sound but narrow extension of *Hale* v. *Henkel*.

Go-Bart Co. v. *United States*, 282 U.S. 344, suppressed the use of records seized from a corporation in what the Court held was an unreasonable search and seizure. It represented another appropriate but narrow extension of *Hale* v. *Henkel* to deal with an unusual situation far removed from a challenge by a grand jury witness to the evidence on the basis on which the grand jury called or proposed to examine the witness.

2. Mr. Justice Douglas also requested the government to comment on the recent decision of the Seventh Circuit in *Dionisio* v. *United States*, 442 F. 2d 276, pending on petition for a writ of certiorari, No. 71-229. That case and the subsequent decision of that court in *Mara* v. *United States*, No. 71-1740, September Term, 1971, decided December 1, 1971, pending

on petition for a writ of certiorari, No. 71-850, in our view significantly and erroneously extend the application of the Fourth Amendment to grand jury proceedings.[1] They require that a grand jury request for physical evidence from a subpoenaed witness be based upon a showing of reasonable grounds for the request and an inability otherwise to obtain the evidence. As we pointed out in our petitions for certiorari in those cases, the Seventh Circuit, in relying on *Davis* v. *Mississippi*, 394 U.S. 721, thus mistakenly equated a grand jury subpoena with an arrest requiring probable cause.[2] As we there noted, the decision in *Hale* v. *Henkel* itself recognized that the grand jury need not have probable cause to investigate; rather its function is to decide whether there is probable cause to believe that a crime has been committed and whether anyone should be charged.

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[1] The Second Circuit has recently rejected the approach of these cases, *United States* v. *Doe (Cynthia Schwartz)* (No. 663, September Term, 1971), decided March 9, 1972, opinion filed March 28, 1972.

[2] *Davis*, to which Mr. Justice Douglas referred during argument, held that "fingerprints obtained from petitioner should have been excluded from evidence as the product of a detention which was illegal under the Fourth and Fourteenth Amendments" (p. 722). The case involved an application of the exclusionary rule to the particular factual situation involved; it presented no question with respect to compliance with a grand jury subpoena. The *Davis* case accords with the government's position in these cases that a grand jury witness may fully protect himself from any injury he may suffer from an unreasonable search and seizure by preventing the introduction of that evidence against him if the grand jury should indict him.

The position taken by the witnesses in the instant cases goes substantially beyond even *Dionisio* and *Mara*, and far beyond the principles laid down in *Hale* v. *Henkel*, *supra*; *Silverthorne Lumber Co., Inc.* v. *United States*, *supra*; and *Boyd* v. *United States*, 116 U.S. 616. They urge that they are not obliged to answer questions of the grand jury as to non-privileged matters until there has been a final determination of their claim that the grand jury intends to rely upon evidence resulting from an illegal search. They make no claim of over-breadth in the grand jury's inquiry; they seek to thwart a legitimate inquiry not directed at them by litigating the source of the grand jury's determination to call them as witnesses. For reasons set forth in our main briefs in these cases, we believe that position is unsound, and, as this Court said in *Lanza* v. *New York*, 370 U.S. 139, 145, "To hold that the petitioner could not constitutionally be convicted for refusing to answer such questions [before a legislative committee] simply because they related to a conversation which had been unlawfully overheard by other state officials would thus be a completely unprecedented step."

Neither *Hale* v. *Henkel* nor any other case in this Court suggests that—under the Fourth Amendment—witnesses have no duty to testify before the grand jury unless and until it has been judicially determined

that the evidence leading to their subpoenas or questions to be asked of them was lawfully obtained.

Respectfully submitted.

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Solicitor General.

APRIL 1972.

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